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IN THE

Supreme Court of the United States

THE SHIPPING CORPORATION OF INDIA, LTD.,
Petitioner,

—v.—

JALDHI OVERSEAS PTE LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C. IN OPPOSITION TO THE PETITION

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The Clearing House Association L.L.C. (the "Clearing House") submits this brief as *amicus curiae* in opposition to The Shipping Corporation of India, Ltd.'s ("SCI's") Petition for a Writ of Certiorari (the "Petition" or "Pet.") for review of the opinion of the United States Court of Appeals for the Second Circuit filed on October 16, 2009 in this matter (the "Opinion," Appendix to Petition ("Pet. App.") 1a-31a).[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Clearing House is an association of leading commercial banks that, through an affiliate, The Clearing House Payments Company L.L.C. ("Payco"), provides payment, clearing and settlement services to its member banks and other financial institutions.[2]

The Clearing House was the only participant in this matter to urge the Second Circuit to decide, as it ultimately did, to overrule its earlier opinion in

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[1] Counsel for each party was given timely notice of the Clearing House's intent to file this brief, and consented. No counsel for a party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

[2] The members of the Clearing House are Bank of America, N.A., The Bank of New York Mellon, Capital One, N.A., Citibank, N.A., Deutsche Bank Trust Company Americas, HSBC Bank USA, N.A., JPMorgan Chase Bank, N.A., The Royal Bank of Scotland, N.V., UBS AG, U.S. Bank N.A. and Wells Fargo Bank, N.A.

Winter Storm Shipping, Ltd. v. *TPI*, 310 F.3d 263 (2d Cir. 2002), *cert. denied*, 539 U.S. 927 (2003). In *Winter Storm*, a three-judge panel fashioned a rule in the Second Circuit that the amount of an electronic funds transfer ("EFT") at an intermediary bank is subject to attachment under Rule B(1)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims (and, now, Asset Forfeiture Actions) ("Rule B"). 310 F.3d at 278. Rule B permits the attachment of "the defendant's tangible or intangible property." FED. R. CIV. P. SUPP. R. B(1)(a). *Winter Storm* permitted attachment of the amount of an EFT payment order received by an intermediary bank as property of the "originator" of the EFT. The case below presented the issue of whether *Winter Storm*'s holding should be extended to cases where the defendant was the "beneficiary" of a funds-transfer payment order.

EFTs have long been an integral component of business transactions and the general economy, as they facilitate an efficient, high-speed and low-cost method of making payments. *See Banque Worms* v. *BankAmerica Int'l*, 77 N.Y. 2d 362, 369, 568 N.Y.S.2d 541, 545 (1991). The effective operation of the funds-transfer system in the United States depends on the uniform observance of its rules. Hence, all fifty states and every U.S. territory (with the exception of Guam) have adopted Article 4A of the Uniform Commercial Code ("U.C.C.") to determine the rights, duties, and liabilities of parties involved in the funds-transfer process. *See Grain Traders, Inc.* v. *Citibank, N.A.*, 160 F.3d 97, 102-03 (2d Cir. 1998). Contrary to the *Winter Storm* rule, Article 4A plainly declares that an intermediary bank holds no property of the

originator or beneficiary of a funds transfer and, because of that fact, intermediary banks are immune from attachments seeking property of the originator or the beneficiary. *See* U.C.C. §§ 4A-502(4) & cmt. 4; 4A-503 & cmt.

As a result of *Winter Storm* and its progeny, major banks in New York every day were being served with hundreds of writs of maritime attachment targeting EFTs. This imposed significant strains on the banks and the international funds-transfer system. Banking customers could no longer be assured of completing U.S.-dollar funds transfers through New York without judicial interference. As the court below concluded: "Our holding in *Winter Storm* not only introduced uncertainty into the international funds transfer process, but also undermined the efficiency of New York's international funds transfer business." Pet. App. 7a (internal quotations and citation omitted).

A large portion of EFTs involving U.S. dollars are routed through the Clearing House banks because of their positions as leading financial institutions, their widespread correspondent bank networks, and the dollar's continuing role as the world's leading currency for international trade. Moreover, Payco operates the Clearing House Interbank Payments System ("CHIPS"), which each day processes on average over 330,000 payment orders, with an aggregate average daily value of $1.450 trillion as of December 31, 2009.[3]

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[3] *See* www.chips.org/docs/000652.pdf (last visited Feb. 11, 2010).

Accordingly, the Clearing House has a substantial interest in the questions presented in this case.

SUMMARY OF ARGUMENT

As a threshold matter, the issues presented in the Petition are moot. The Opinion below affirmed a June 27, 2008 Order of the U.S. District Court for the Southern District (Rakoff, J.) (the "Vacatur Order," Pet. App. 32a-35a) vacating the attachment of funds involved in a number of EFTs of which the defendant, Jaldhi, was the beneficiary. On remand, the district court took two actions that make this case unreviewable. *First*, the district court entered a final judgment dismissing SCI's lawsuit and directed the Clerk of the Court to close all open docket entries. *See* Responding Appendix ("Resp. App.") 1b. And *second*, the court ordered the release of the funds that had been attached prior to the Vacatur Order. *Id.* 3b. As a result, this Court cannot grant effective relief to SCI even it prevails, and there is no live "controversy" to review.

There is no reason, in any event, for this Court to review the Opinion of a panel of the Second Circuit that was reviewed and approved by all nine active members of the court. The court below found "*Winter Storm*'s reasons unpersuasive and its consequences untenable." Pet. App. 23a. In particular, the court concluded that "the holding in *Winter Storm* erroneously relied on [*United States* v.] *Daccarett*, 6 F.3d 37 [(2d Cir. 1993), a civil forfeiture case], to conclude that EFTs are attachable property," and, further, that "the effects of *Winter Storm* on the federal courts and international banks in New York are too significant

to let this error go uncorrected simply to avoid overturning a recent precedent." Pet. App. 19a.

Setting aside *Winter Storm*, the court instead examined established precedent discussed *infra* and held that from then on the rule in the Second Circuit would be that "EFTs being processed by an intermediary bank in New York are not subject to Rule B attachment." *Id.* 29a. The Petition does not cite to any federal law or conflicting precedent that supports the *Winter Storm* rule and does not otherwise point to any important interest that would be served by this Court's review of the Opinion.

First, the Opinion properly concluded that "*Daccarett* provides no persuasive guidance on the validity of Rule B attachments of EFTs, and should not serve as the foundation for a rule that allows the attachment of EFTs under Rule B." Pet. App. 25a. There is no dispute that to attach an EFT under Rule B, the amount of an EFT must both be (1) "tangible or intangible property" and (2) the "defendant's" property. As the Petition concedes, *Daccarett* held only that funds traceable to an illegal activity were subject to forfeiture under 21 U.S.C. § 881, and not that the originator or beneficiary of an EFT had a *property interest* in the amount of a funds-transfer payment order at an intermediary bank.

Second, after concluding that *Winter Storm* had been wrong to find support in *Daccarett*, the court followed federal precedent and turned to state law to determine whether the amount of an EFT can be considered a "defendant's" property for purposes of attachment under Rule B. *See* Pet. App. 26a-27a. SCI does not contend that there is any valid federal

precedent for the *Winter Storm* rule that the court below overlooked. Instead, the Petition argues expansively that looking to State law in this case conflicts with "historical purposes of maritime attachment" and that the Second Circuit should have "fashion[ed] a rule of attachability of 'intangible property'" consistent with those purposes. *See* Pet. 24. This claim has no merit.

Third, the Court correctly held that the State law directly applicable to funds transfers passing through New York, Article 4A of New York's codification of the U.C.C., "establish[es] that EFTs are neither the property of the originator or the beneficiary while briefly in the possession of an intermediary bank." Pet. App. 28a. Although the result of this holding is that the amount of an EFT cannot be subject to attachment under Rule B, there is no conflict between the Second Circuit's conclusion and the language of Rule B or the "historical purposes of maritime attachment."

Fourth, there are no other compelling interests at stake that warrant review. The parties below did not argue the points now raised in the Petition. The question of whether the amount of an EFT is the "defendant's" property subject to attachment under Rule B has only been faced by the courts of the Second Circuit. There is no important domestic interest in maintaining the ability to attach the amount of an EFT under Rule B in actions by and against foreign parties with few or no U.S. contacts. And, finally, the Petition's assertion that this Court should review the Opinion to avoid "disrupt[ing] the uniformity necessary to the smooth functioning of maritime commerce" is ironic. Not only is this assertion unfounded and unsupported,

but the Opinion in fact restores the uniformity of treatment of funds transfers under the U.C.C. and federal law and enhances the smooth functioning of the international payments system. *See* FEDERAL RESERVE SYSTEM REGULATION J, 12 C.F.R. Pt. 210.

ARGUMENT

I. The Petition Should Be Dismissed as Moot.

The initial issue in this case is whether the release of the funds restrained pending the disposition of SCI's appeal to the Second Circuit and dismissal of the underlying action on remand permit further review of the Opinion consistent with principles of justiciability under Article III of the Constitution. We respectfully submit that such review is not permitted.[4]

The Opinion concluded that the district court did not err in vacating the attachment of the amounts of EFTs of which the defendant below was the beneficiary, and remanded the cause to the district court with directions to consider whether to vacate the remaining portions of the attachment order affecting EFTs. Pet. App. 29a. On remand, in an Order and Judgment dated October 30, 2009 and entered on November 3, 2009, the district court held that it was "patent that the remaining portion of the attachment previously issued in this case must be

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[4] Counsel should inform the Court of developments that may have the effect of depriving the Court of jurisdiction to hear this matter due to the absence of a justiciable "controversy." *See, e.g., Board of License Com'rs of Town of Tiverton* v. *Pastore*, 469 U.S. 238, 240 (1985).

vacated and all remaining motions dismissed as moot." Resp. App. 1b.

The district court also directed the entry of a final judgment dismissing the case and directed the Clerk of the Court to close all open docket entries, *id.*, and a few days later ordered the release of the funds that SCI had managed to attach before the district court's Vacatur Order. *See id.* 3b. These events took place well before the Petition was filed on January 14, 2010.

Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. *See Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988). Accordingly, "the court is not empowered to decide moot questions or abstract propositions, or to declare . . . principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California* v. *San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893). Yet, this is exactly what SCI is asking this Court to do.

This matter falls squarely within the scope of this Court's longstanding rule that a case must be dismissed as moot "if an event occurs [pending review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). The Petition asks this Court to review this case and hold that SCI validly attached funds involved in six EFTs. Now that the attached funds have been released and a judgment entered dismissing SCI's claim against Jaldhi,

however, this Court is no longer empowered to grant SCI the relief it requests.

It is well established that a court cannot reattach a *res* once it is gone. *See Pride Shipping Corp.* v. *Tafu Lumber Co.*, 898 F.2d 1404, 1409 (9th Cir. 1990) ("[T]he attachment issue . . . is now moot, since neither we nor the district court can order reattachment of the [*res*]."). As Justice Frankfurter observed in *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, an admiralty case, "[a]ppellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible." 339 U.S. 684, 689 (1950).

The district court's entry of a judgment dismissing the case is an equally compelling ground for dismissing the Petition as moot. When an appeal is taken from an interlocutory order, and the district court then enters final judgment while the interlocutory appeal is pending, the interlocutory order merges into the final judgment and the appeal becomes moot. *See Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1998). Accordingly, this Court has dismissed, for example, appeals from denials of temporary injunctions once final judgment has been entered. *See, e.g., Harper ex rel. Harper* v. *Poway Unified School Dist.*, 549 U.S. 1262 (2007).

II. The Petition Should Be Denied Because the Second Circuit Properly Concluded, as a Matter of Federal and New York Law, that EFTs Are Not Subject to Rule B Attachment.

A. The Opinion Correctly Found that There Was No Relevant Federal Law Determining an Admiralty Defendant's Interest in an EFT.

Rule B permits attachment of "the defendant's tangible or intangible property." FED. R. CIV. P. SUPP. R. B(1)(a). As the court below held, "[t]he validity of a Rule B attachment depends entirely on the determination that the *res* at issue is the property of the defendant at the moment the *res* is attached." Pet. App. 24a. The Petition does not dispute this plain reading of the text of Rule B or suggest that any contrary rule developed out of the ancient practice of maritime attachment.

1. Civil Forfeiture Law Does Not Address a Defendant's Interest in Property.

Looking for a precedent concerning the "susceptibility of funds involved in an EFT to attachment under Admiralty Rule B," *Winter Storm* turned to *Daccarett*, *supra*, a forfeiture case involving the drug trafficking and money laundering activities of a Colombian drug cartel. 310 F.3d at 276-77. The court below properly concluded that "*Winter Storm*'s reliance on *Daccarett* was misplaced" because "*Daccarett* did not decide that the originator or beneficiary of an EFT had a *property interest* in the EFT." Pet. App. 23a (emphasis in original). The Petition concedes this point, *see* Pet. 8 ("There was . . . no occasion for the

court [in *Daccarett*] to consider who owned the funds because it involved an *in rem* proceeding."). And the Petition does not cite to any federal law or pre-*Winter Storm* precedent that could have guided *Winter Storm* to the same conclusion.

The *Daccarett* court, as appropriate in a forfeiture case, identified the amount of the funds as "traceable" to an illicit activity and therefore subject to attachment under 21 U.S.C. § 881(a).[5] As the Second Circuit had previously recognized in *Aqua Stoli Shipping Ltd.* v. *Gardner Smith Pty Ltd.*, "[b]ecause *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of *whose* assets they are while in transit." 460 F.3d 434, 446 n.6 (2d Cir. 2006).

As a remedy *quasi in rem*, the validity of a Rule B attachment depends entirely on the determination that the *res* at issue is property of the

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[5] 21 U.S.C. § 881(a) provides, in relevant part:

> The following shall be subject to *forfeiture to the United States* and *no property right shall exist in them*:
>
> * * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds *traceable* to such an exchange, and all *moneys*, negotiable instruments, and securities used or intended to *be used to facilitate* any violation of this subchapter.

(emphasis added).

judgment debtor at the moment it is attached. *See J. Lauritzen A/S* v. *Dashwood Shipping, Ltd.*, 65 F.3d 139, 141 (9th Cir. 1995). Forfeiture, in contrast, is a remedy *in rem*, based as it is on the "well-established theory that the 'thing is itself treated as the offender and made the defendant by name or description.'" Pet. App. 24a-25a (quoting *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998)). In the forfeiture context, "ownership of the *res* is irrelevant, as the court has personal jurisdiction regardless of who owns the *res* at issue." Pet. App. 25a; *see Daccarett*, 6 F.3d at 46 ("[E]ven when the initial seizure is found to be illegal, the seized property can still be forfeited" (citation omitted).). In contrast, under Rule B, the court below correctly concluded that it was not enough that the amount of a funds transfer constitute a seizable *res* – it must constitute the *defendant's* seizable *res*.

2. There Is No Other Federal Law on Point that the Second Circuit Overlooked.

The court below also was "unpersuaded that either the text of Rule B or our past maritime holdings relating to defendants' bank accounts compel us to conclude as a matter of federal law that an EFT is '*defendant's* . . . personal property.'" Pet. App. 25a (citation omitted and emphasis in original). The *Winter Storm* panel had observed that federal admiralty law regards a defendant's bank account as property subject to maritime attachment under Rule B, and reasoned by extension that EFTs should also be attachable property of the defendant. *See* 310 F.3d at 276. The Petition similarly argues that "an EFT's nature as a credit (necessarily held for

someone's account) is therefore comparable to the nature of a bank account, which does not contain the depositor's cash but merely represents the bank's promise to pay the depositor," Pet. 9.

The Second Circuit was right to dismiss the bank-account analogy out of hand. To explain why, it is first necessary to provide some additional background regarding Article 4A of the U.C.C. and the funds-transfer process.

In typical funds transfers, such as those at issue here, an originator sends a payment order to its bank to pay or cause another bank to pay the beneficiary. Because the originator's bank and beneficiary's bank often are not members of the same payments system, or do not hold accounts with one another, the originator's bank sends a payment order to an intermediary bank, and the intermediary bank then sends a payment order in the same amount to the beneficiary's bank. U.C.C. § 4A-104(1) and (2).

Under this process, an intermediary bank never holds property of the originator or beneficiary. *See Grain Traders,* 160 F.3d at 102-03.[6] Thus, if a funds transfer is not completed, the intermediary bank has no obligation to either the beneficiary or the originator, and its only duty is to return the amount of the funds transfer to its sender (always

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[6] The Second Circuit held in *Grain Traders* that Article 4A prevents an originator of a funds transfer from suing an intermediary bank. 160 F.3d at 102. *Grain Traders* has always remained good law in the Second Circuit, and its logic applies to suits by beneficiaries as well.

another bank). *See* U.C.C. § 4A-402(4). As described in the recent supplementary commentary of the Permanent Editorial Board for the U.C.C. to §§ 4A-502(d) and 4A-503, which provides a comprehensive explanation of the funds-transfer process:

> The intermediary bank has no contractual obligation to the originator or to the beneficiary, and neither the originator nor the beneficiary has any contractual obligation to or rights flowing from the intermediary bank. Thus, credits in an intermediary bank are credits in favor of the originator's bank, *and are not property of either the originator or the beneficiary.*[7]

As the Petition concedes, funds on deposit at a bank create a property right of an accountholder not in the funds themselves but in a bank's promise to pay that accountholder. In contrast, as shown above, debits and credits posted by an intermediary bank that has no business relationship with a defendant in a maritime action involve no promise, explicit or implicit, by the intermediary bank to pay the originator or beneficiary. And even if a bank's promise to pay can be attached under Rule B, a promise to perform by the intermediary banks in

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[7] Permanent Editorial Board for the U.C.C., PEB Commentary No. 16, Sections 4A-502(d) and 4A-503, July 1, 2009, at 2 (emphasis in original), *available at* http://extranet.ali.org/ directory/files/COMMENTARY-4A-502(d)%20and%204A-503-final.pdf.

this case, which was not made to the defendant but to an originator's bank or a beneficiary's bank, is not "defendant's . . . property" within the meaning of Rule B.

Finally, the Petition contends generally that the Opinion "undermine[s] the ancient maritime remedy and has effectively limited its reach," Pet. 17. The court below found this not to be the case, observing that there is no "historical rationale that justifies the extension of federal maritime common law" to support the practice that arose in the Second Circuit under *Winter Storm*:

> Streamlined Rule B practices . . . developed out of the concern that ships might set sail quickly, not because the courts intended to arm maritime plaintiffs with writs of attachment prior to the arrival of the ship in port. Under *Winter Storm,* however, maritime plaintiffs now seek writs of attachment pursuant to Rule B long before the defendant's property enters the relevant district, often based solely on the speculative hope or expectation that the defendant will engage in a dollar-denominated transaction that involves an EFT during the period the attachment order is in effect.

Pet. App. 26a; *see Cala Rosa Marine Co. Ltd.* v. *Sucres et Deneres Group*, 613 F. Supp. 2d 426, 431 (S.D.N.Y. 2009) ("there is no reason to believe that defendant's property was in the United States at the time this motion was filed or will be in the United States before the arbitration is settled"). Clearly,

maritime commerce existed on a viable basis before *Winter Storm* and it has continued to do so after its reversal.

Moreover, *Winter Storm* did not purport to disturb the long-standing rule in the Second Circuit, itself derived from state law, that a maritime attachment served when the garnishee holds no property of the defendant is absolutely void. *Reibor Int'l Ltd. v. Cargo Carriers (KACZ-CO.), Ltd.*, 759 F.2d 262, 268 (2d Cir. 1985). Under *Winter Storm*, in contrast to traditional admiralty practices, writs of attachment were repeatedly served on banks in New York, day after day, for weeks or sometimes months on end, often without ever resulting in the attachment of property related to any funds transfer.

B. The Second Circuit Properly Looked to State Law to Determine the Property Rights at Issue.

Absent federal law to guide its decision, the Second Circuit turned to state law to determine whether EFTs can be considered a "defendant's . . . property" for purposes of attachment under Rule B. *See* Pet. App. 26a-27a. The Petition argues that "such resort to State law to determine the scope of this ancient remedy is an improper derogation of the Constitutional protection of admiralty matters under the Admiralty Clause [and] the Supremacy Clause," Pet. 18. This argument grossly mischaracterizes this Court's precedent and the reality of how federal courts decide admiralty cases.

It is well established that "controversies governed by federal law do not inevitably require resort to uniform federal rules." *California ex rel.*

State Lands Comm'n v. *United States*, 457 U.S. 273, 283 (1982); *see Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1942). "It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding the substantive legal issues at hand." *State Lands Comm'n*, 457 U.S. at 283. This Court has followed this rule in numerous admiralty cases. *E.g.*, *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) (citing cases); *Madruga* v. *Superior Court of State of Calif. in and for San Diego County*, 346 U.S. 556 (1954); *The Hamilton*, 207 U.S. 398 (1907).

In *Wilburn Boat*, *supra*, this Court deferred to state law to determine the scope and validity of policy provisions in a maritime insurance policy. *See* 348 U.S. at 314-320 ("The whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties."). Here, as a matter of federal law, there are at least three reasons that support deferring to New York State law to determine whether either the originator or beneficiary of an EFT has rights to the amount of an EFT in transit.

First, property interests generally are a matter of state law. *See Delaware* v. *New York*, 507 U.S. 490, 501-502 (1993) ("'Property interests, of course, are not created by the Constitution,' but rather 'by existing rules or understandings that stem from an independent source such as state law.'" (quoting *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972))); *In re Rodgers*, 333 F.3d 64, 66 (2d Cir. 2003). Federal courts rely

on state law to establish property rights in a variety of fields. *See Butner* v. *United States*, 440 U.S. 48 (1979) (bankruptcy); *In re Rodgers*, *supra* (tax); *Securities and Exchange Commission* v. *Credit Bancorp, Ltd.*, 279 F. Supp. 2d 247, 261 (S.D.N.Y. 2003) (receivership).

Second, as the Second Circuit had previously warned, the law of maritime attachment could potentially be disruptive to international banking practices, *see Reibor*, 759 F.2d at 268, and create uncertainty by placing intermediary banks in the middle of civil disputes. *Grain Traders*, 160 F.3d at 102; *see Det Bergenske Dampskibsselskab* v. *Sabre Shipping Corp.*, 341 F.2d 50, 52-53 (2d Cir. 1965) ("a decision here contrary to the general rule of the state might have disruptive consequences for the state banking system."). The destructive consequences of ignoring state law in this case are unquestionable. The Opinion below addresses the "substantial body of critical commentary" that *Winter Storm* produced and the decision's significant "unforeseen consequences" on the district courts and international banks operating in the Second Circuit. *See generally* Pet. App. 4a-8a. The Second Circuit ultimately concluded that *Winter Storm* had to be overruled, in part because "[u]ndermining the efficiency and certainty of fund transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York's standing as an international financial center." *Id.* 7a.

Third, New York and every other state has adopted Article 4A of the U.C.C., as has the Board of Governors of the Federal Reserve System. *See* FEDERAL RESERVE SYSTEM REGULATION J, 12 C.F.R.

Pt. 210. One of the primary goals of Regulation J is uniformity in the law applicable to all funds transfers. *See id.* Under the now-discredited *Winter Storm* rule, funds transfers were treated differently based on whether the funds were wired through CHIPS or through the Federal Reserve's payments system (Fedwire) — exactly the situation that the Federal Reserve sought to avoid as a matter of federal policy. Also, to the extent that uniformity in the availability of maritime attachments is an important consideration in a court's decision to follow state law, the nationwide adoption of Article 4A supports the Second Circuit's decision here.

C. There Is No Dispute as to the Result of Applying State-Law Property Rights in this Case.

Relying on several provisions of and "authoritative comment[s]" to New York's codification of Article 4A of the U.C.C., the Opinion properly concluded that "EFTs are neither property of the originator nor the beneficiary while briefly in the possession of an intermediary bank. Because EFTs in the temporary possession of an intermediary bank are not property of either the originator or the beneficiary, they cannot be subject to attachment under Rule B." Pet. App. 28a.

In relevant part, the U.C.C. provides that "until the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, the beneficiary has no property interest in the funds transfer which the beneficiary's creditor can reach." U.C.C. § 4A-502 cmt. 4. In addition, the U.C.C. plainly declares that

intermediary banks are immune from attachments seeking property of the originator or the beneficiary, specifically because an intermediary bank holds no property of the originator or beneficiary of a funds transfer. U.C.C. §§ 4A-502(4) & cmt. 4; 4A-502(2); 4A-503 & cmt.

Moreover, "[w]hile courts have attempted in wire transfer cases to employ, by analogy, the rules of the more traditional areas of law, such as contract law," New York State law defers entirely to Article 4A of the U.C.C. to define "the rights and obligations that arise from wire transfers." *Banque Worms*, 77 N.Y.2d at 369 (internal quotations and citation omitted). Thus, although rights under a contract may be attachable under some circumstances, Article 4A could not be more clear that no party has a contractual right against an intermediary bank in an EFT except (i) the bank that sent it a payment order, and then only if the EFT is not properly executed or completed for a reason not excused under law, U.C.C. § 4A-402(4), or (ii) the bank receiving a payment order if the intermediary bank executes its sender's order by sending a corresponding payment order to the beneficiary's bank or another intermediary bank, in which case it must pay the amount of the order to the receiving bank, U.C.C. § 4A-402(3). The drafters of Article 4A, and the legislatures that enacted it, specifically wrote the statute and added comments to clarify that state law permits no other result. Accordingly, unless there is superseding federal law, Article 4A must be honored.

Since 2000, issues regarding pre-emption have been subject to analysis on three levels: express pre-emption, field pre-emption and pre-

emption through conflict with a federal statute. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). The Petition asserts that "the relevant sections of [Article 4A of the U.C.C.] are in direct conflict with Rule B," but fails to mention *Crosby* or engage in any pre-emption analysis. That is not surprising because such an analysis would have been unavailing. There is obviously neither express pre-emption nor field pre-emption, and a direct conflict exists only if Rule B is expanded, as *Winter Storm* attempted to do, to create property rights. Rule B, however, is only a procedural tool, and it does not create property rights. *See Sonito Shipping Co. Ltd.* v. *Sun United Maritime Ltd.*, 478 F. Supp. 2d 532, 537 (S.D.N.Y. 2007). *Winter Storm* created such a right so that a funds-transfer payment order could be attached, a result that ignored *Crosby* and the limitations imposed by the Rules Enabling Act, 28 U.S.C. § 2072(b).

III. There Is No Reason for this Court to Review the Opinion.

Setting aside that the Petition is moot and that the Second Circuit correctly decided the issues before it, there is no strong policy reason for the Court to review this case. The Opinion noted that its decision to overrule *Winter Storm* was not taken lightly:

> Our reasons for reversing a relatively recent case are twofold. First, and most importantly, we conclude that the holding in *Winter Storm* erroneously relied on *Daccarett* to conclude that EFTs are attachable property. Second, as noted above, the effects of *Winter*

> *Storm* on the federal courts and international banks in New York are too significant to let this error go uncorrected simply to avoid overturning a recent precedent.

Pet. App. 19a (citations omitted).[8] This is not a case that warrants interfering with the Second Circuit's judgment, for several additional reasons.

First, the Opinion is the product of the Second Circuit's own judicial housekeeping. It recognized that a recent ruling was in error and created enormous practical problems, and remedied the situation. Both parties' counsel were active participants in the burgeoning maritime attachment industry that *Winter Storm* had created, and neither party asked the Second Circuit to overrule *Winter Storm*. The errors and consequences of *Winter Storm* were nevertheless intolerable enough for the court to address "the question of whether the rule of *Winter Storm* should be reconsidered and, upon reconsideration, overruled." Pet. App. 3a.

Second, as the Petition concedes, "[a]s a practical matter, the attachment of EFTs as 'intangible property' under Rule B is a uniquely Second Circuit issue and remedy. There is not now and likely will never be a conflict between the Circuit courts as to the attachability of EFTs under Rule B for that reason," Pet. 18. The Clearing

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[8] Based on filings in the Southern District of New York, from October 1, 2008 to January 31, 2009, maritime attachment cases constituted 33% of all lawsuits filed in that district and sought to attach $1.35 billion. Pet. App. 6a.

House agrees. The rule established by the court below, just like the consequences that followed the erroneous ruling in *Winter Storm*, applies uniquely to the Second Circuit and the Southern District of New York in particular, because that is where the banks and clearing systems that are integral to the international payments system are located.

Third, besides New York banks (which are not complaining), and perhaps the members of the maritime bar in New York, the Opinion hardly affects U.S.-based interests – except to benefit the thousands of businesses and organizations that rely on a smoothly functioning payments system. As the court below noted, the requirement under Rule B that a defendant cannot be "found within the district" limits the practical effect of this case. *See* Pet. App. 8a-9a. Almost all the actions that were affected by *Winter Storm* and will be affected by the Opinion, involve, or would likely have involved, foreign parties asserting claims under foreign law against other foreign parties with few or no U.S. contacts. *See, e.g.*, *Cala Rosa*, 613 F. Supp. 2d at 431 (noting "the relative lack of interest the United States forum has in this dispute," and thus "little reason to impose enormous strains on the New York banking system and to create disparities between New York and federal law").

Finally, although the Petition suggests that the Opinion will undermine the "smooth functioning of maritime commerce," Pet. 24, it does not explain how or to what extent. There is a clear difference between the maritime industry and the maritime attachment industry that was fueled by *Winter Storm*. The *Winter Storm* rule, as time has told, was an aberration and imposed significant strains

on the federal courts and international banks and their customers in the Second Circuit. The Opinion below restored the smooth functioning of international payments and thereby benefitted maritime commerce. Moreover, as discussed above, applying Article 4A of the U.C.C. to determine property rights in an EFT is not destructive of uniformity.

In sum, there are no compelling interests that warrant any further review of the Second Circuit's conclusion, "with the consent of all of the judges of the Court in active service, that *Winter Storm* was erroneously decided and should no longer be binding precedent in our Circuit." Pet. App. 4a.

CONCLUSION

For the reasons discussed above, the Court should deny the Petition.

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